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Majority Opinion >

SUPREME COURT OF NEW YORK, KINGS COUNTY

RAD AND D'APRILE, INC. A/K/A RAD & D'APRILE, INC., Plaintiff, - against - ARNELL CONSTRUCTION CORP., Defendant. Index No. 502464/14

502464/14

April 3, 2019, Decided
THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PRESENT: HON. SYLVIA G. ASH, JSC.

SYLVIA G. ASH

Upon the foregoing papers, in this action by plaintiff Rad and D'Aprile, Inc. a/k/a Rad & D'Aprile, Inc. (Rad) against defendant Arnell Construction Corp. (Arnell), Arnell moves, under motion sequence number four, for an order, pursuant to CPLR 3212 , granting it summary judgment against Rad dismissing all causes of action contained in Rad's amended verified complaint. Rad cross-moves, under motion sequence number five, pursuant to CPLR 3212 , for an order, in its favor against Arnell as follows: (1) granting it summary CPLR 3212 , for an order, in its favor against Arnell as follows: (1) granting it summary judgment on its first cause of action in its amended verified complaint in the amount of $74,964.93, together with interest, costs, and disbursements; (2) granting it partial summary judgment on its second, third, and fourth causes of action in its amended verified complaint on the issue of Arnell's breaches of the liquidating agreement; (3) directing the holding of a hearing/trial to calculate its damages on its second, third, and fourth causes of action; and (4) dismissing all of Arnell's affirmative defenses set forth in Arnell's answer to its amended verified complaint.

Facts and Procedural Background

On June 25, 2011, Arnell executed a prime construction contract (the prime contract) with the City of New York (the City), acting by and through the New York City Department of Sanitation (the DOS), to provide general construction services for the construction of two new sanitation garages for Districts 1 and 4 at 161 Varick Street, in Brooklyn New York (the project). On August 22, 2001, in furtherance of the prime contract, Arnell, as the general contractor on the project, entered into a subcontract with Rad, a masonry subcontractor, to perform certain unit masonry work (the subcontract).

After Rad and Arnell entered into the subcontract, Rad learned that the start of its work would be delayed because the City did not own and/or did not have the right to access the site where the project was to be constructed. Even after Rad was able to start work, the City only provided access to a portion of the project site, forcing Rad to perform its work in a piecemeal fashion. This caused Rad to have increased costs in performing its work, including the costs of labor, materials, and its supervision of its own work at the project.

Since Rad's subcontract was with Arnell and not with the City, it could only make a claim for its damages through Arnell, which had the right to make a claim against the City. By a letter dated June 4, 2002, and a second identical letter dated July 25, 2002, Rad complained to Arnell that increases in its compensation under the subcontract were necessary due to the delays that it encountered. By a letter dated August 9, 2002, Arnell responded as follows:

> "In response to your 7/25/02 letter **[*2]** requesting an increase to your contract due to delays, we have agreed to the following terms. Arnell will increase your contract by $100,000 to help offset your increased costs. Your revised contract amount will now be $3,100,000.00. [Rad's] additional costs, due to delays, will be incorporated into [Arnell's] claims against the owner [i.e., the City] at the completion of the contract. Any money received in the settlement of the claim (for Rad) over the $100,000.00 will be forwarded to you."

Thus, by this August 9, 2002 letter, Rad and Arnell

entered into a pass-through agreement, also known as a liquidating agreement. This liquidating agreement required Arnell to increase Rad's subcontract amount by $100,000 and incorporate Rad's additional costs, due to delays, into its own claim against the City. Under the liquidating agreement, Arnell assumed the duty to prosecute Rad's claims for damages against the City, and to forward to Rad any money received by it in a settlement of the claim for Rad over the sum of $100,000.

In early 2005, the president of Rad, Andrew Feldman, contacted Robert D. Munster, the president of Bethay Consultants (Bethay) and a construction claims consultant, to review Rad's project records and to prepare a claim for delay damages for Arnell to submit to the City on Rad's behalf. Throughout 2005, Mr. Munster and his associate reviewed Rad's project records and prepared Rad's damage claim. Arnell's key project employee was Barry Aronowitz, who reviewed drafts of Rad's claim and asked for changes to be made to it. Mr. Aronowitz asked Rad to revise some of the claims schedules and instructed Rad not to include some claims. Rad's claim was finalized, and, on October 31, 2005, Rad's claim was delivered to Mr. Aronowitz at Arnell.

Consistent with the typical standard format when claims are submitted to an owner by a general contractor on behalf of itself and its subcontractors, Rad's claim was not submitted by itself to the City, but was submitted to the City with claims from other Arnell subcontractors as part of Arnell's claim. In January 2006, Rad was informed that Arnell submitted its own claims, which incorporated Rad's claims and those of other subcontractors, to the City. According to Mr. Feldman, he spoke to Mr. Aronowitz and Harold Zarember, who is Arnell's owner and president, throughout 2006, 2007, and 2008, to find out the status of Rad's claim, and was told that Rad's claim was being reviewed by the City, that Rad would be hearing about its claim, and that Rad need not take any further action.

In December 2008, Mr. Feldman learned that Arnell had retained an attorney, Henry Goldberg, Esq., to pursue Arnell and Rad's claims against the City. He also learned that Jack Menco, a claims consultant, had been hired by Arnell, on Mr. Goldberg's recommendation, to work on the project claim. Rad was asked to send Mr. Menco a copy of Rad's claim that had been prepared by Mr. Munster, and, on December 30, 2008, Rad sent a copy of its claim to Mr. Menco.

According to Mr. Feldman, in March 2009, when he asked Mr. Aronowitz about Rad's claim, he was told by Mr. Aronowitz that he would follow-up and assured **[*3]** him that Rad's claim was being prosecuted. Mr. Feldman eventually learned that Rad's claim was not timely submitted to the City, and that Arnell did not submit any claim to the City until August 11, 2010, when Arnell filed a verified notice of claim against the City, alleging the various delays and interferences by the City and the DOS and extra work, including the delays and interferences caused to Rad and Rad's extra work. In Arnell's notice of claim, Rad's claims in the amount of $2,099,192 were incorporated into and made part of its claims against the City.

On December 13, 2010, Arnell commenced an action against the City and the DOS in the Supreme Court, New York County (*Arnell Constr. Corp. v City of New York*, Sup Ct, NY County, index No. 651491/2010) (the New York County action), seeking $15,092,471.40 on its own behalf and on behalf of Rad and other subcontractors, alleging the delays, interferences, and extra work on the project. By a decision and order dated May 7, 2012 in the New York County action, Justice Eileen Bransten denied a motion by Arnell for partial summary judgment, granted a cross motion by the City and the DOS to dismiss Arnell's complaint as time-barred, and denied a cross motion by Arnell to dismiss the City and the DOS' affirmative defenses which asserted that Arnell's claims were time-barred. Justice Bransten held that article 56 of the prime contract established a statute of limitations period for claims against the City and the DOS requiring such claims to be commenced within six months after the date the Commissioner1 issued a certificate of substantial completion. Justice Bransten found that Arnell had substantially completed its work on December 7, 2007, and that this six-month period was triggered on December 27, 2007, when the City forwarded to it notice of the substantial completion, requiring it to bring its claims prior to June 27, 2008 in order for those claims to be timely.

On March 21, 2014, Rad filed this action against Arnell. Rad's original complaint alleged five causes of action, including: (1) a first cause of action for breach of

contract related to its subcontract balance allegedly due to it on the project, and seeking the recovery of $74,964.93, plus interest; (2) a second cause of action for breach of the duty of good faith and fair dealing with respect to its pass-through delay claims, and seeking the recovery of $2,099,192, plus interest, for not prosecuting its claim timely; (3) a third cause of action for breach of fiduciary duty based on Arnell's failure to prosecute its claims, and seeking $2,099,192, plus interest; (4) a fourth cause of action for breach of contract related to Arnell's failure to directly pay for its delay damages, and seeking the recovery of $2,099,192, plus interest; and (5) a fifth cause of action based upon a theory of quantum meruit, and seeking the recovery of $2,174,157.03, plus interest, as the reasonable value of its work. On August 29, 2014, Arnell filed a motion to dismiss Rad's complaint.

By a decision and order dated June 5, 2015 (*RAD & D'Aprile Inc. v Arnell Constr. Corp.*, 49 Misc 3d 189 , 12 N.Y.S.3d 812 [Sup Ct, Kings County 2015], *affd* ***[*4]*** *sub nom. Rad & D'Aprile, Inc. v Arnell Constr. Corp.*, 159 AD3d 971 , 74 N.Y.S.3d 266 [2d Dept 2018]), now retired Justice Carolyn E. Demarest dismissed Rad's first, third, fourth, and fifth causes of action as time-barred. Specifically, Justice Demarest ruled that Rad's first and fourth causes of action for breach of contract accrued against Arnell upon substantial completion of its work, which occurred on September 30, 2005. Justice Demarest further ruled that while Arnell owed Rad a fiduciary duty, the statute of limitations on its third cause of action for breach of fiduciary duty was time-barred because it accrued on June 27, 2008, when it allowed its six-month limitations period to lapse. Justice Demarest held that Rad's fifth cause of action for quantum meruit did not state a cognizable cause of action because there was a valid and enforceable written subcontract governing the disputed subject matter, and it was also time-barred.

Justice Demarest, however, in her June 5, 2015 decision and order, denied dismissal of Rad's second cause of action. Justice Demarest found that the statute of limitations for Rad's second cause of action, based upon Arnell's breach of its obligations under the liquidating/pass-through agreement, first commenced to run on June 27, 2008, the date on which the statute of limitations expired on Arnell's claims against the City and the DOS. Justice Demarest further held that by the liquidating agreement, Arnell "assumed a duty to prosecute its claims against the City and the DOS in good faith, and was required to commence the New York County action asserting those claims before the statute of limitations on its own claims expired" (id. at 200). She noted that "[t]he contractual covenant of good faith and fair dealing, which is implied in every contract, applies to a liquidating agreement, and generally requires the contractor to take all reasonable steps so that the [subcontractor's] right to an eventual recovery, if any, from the [owner] will be protected (id. at 200-201 [internal quotation marks omitted]). She ruled that, therefore, Arnell, as the general contractor had "a duty to make a good faith effort to present [Rad's] claim to the [City] in a fair and serious manner" (id. at 201 [internal quotation marks omitted]).

Arnell appealed Justice Demarest's decision and order. By a decision and order dated March 28, 2018, the Appellate Division, Second Department, affirmed Justice Demarest's decision and order (*Rad & D'Aprile, Inc. v Arnell Constr. Corp*, 159 AD3d 971 , 74 N.Y.S.3d 266 [2d Dept 2018]). In so affirming, the Appellate Division, Second Department, held that the allegations in Rad's complaint and the evidence submitted by Rad in opposition to Arnell's motion to dismiss stated a cause of action alleging that Arnell "breached its implied duty of good faith and fair dealing under the liquidating agreement by failing to commence the [New York County] action within the time period provided for in the prime contract notwithstanding its notice of the substantial completion date for the project" (*id.* at 973-974).

While Arnell was in the process of appealing Justice Demarest' **[*5]** s June 5, 2015 decision and order, but before the March 28, 2018 decision and order by the Appellate Division was rendered, Rad, in November 2015, obtained documents from the City about the project, which revealed that on August 2, 2013, one year before Arnell filed its motion to dismiss Rad's complaint on August 29, 2014, Arnell had settled the New York County action against the City after Justice Bransten had dismissed that action on May 7, 2012 (the August 2013 settlement). Arnell received $3,638,495.69, consisting of a contract balance payment in the amount of $1,838,495,69 and the release of the face value of securities held in a custodial account in an amount of not less than $1,800,000, which had been delivered to the City during the project in exchange for the City's paying retention to Arnell. The August 2013 settlement also included Arnell discontinuing, with prejudice, its appeal

of the dismissal of the New York County action against the City, which had included Rad's claim.

Arnell claims that none of the monies that were paid by the City in the August 2013 settlement are owed to Rad, but it admits that it released Rad's claim in this settlement. Until November 2015, when Rad learned of the August 2013 settlement during discovery, Rad was completely unaware of this settlement by Arnell. Arnell had never consulted with Rad or even told Rad about the August 2013 settlement despite the fact that this settlement was completed well before Arnell moved to dismiss Rad's original complaint. The August 2013 settlement was also never disclosed by Arnell to Justice Demarest when Arnell made its motion to dismiss on August 29, 2014 or at any time before Justice Demarest rendered the June 5, 2015 decision and order. Based upon Arnell's secret settlement, Rad moved, pursuant to CPLR 2221 (e) , for an order granting it leave to renew its opposition to Arnell's motion to dismiss, and, upon such renewal, an order vacating Justice Demarest's June 5, 2015 decision and order to the extent that it dismissed its first, third, fourth, and fifth causes of action, or, in the alternative, an order, pursuant to CPLR 3025 (b) , granting it leave to amend its complaint.

By a decision and order dated July 28, 2016, this court2 denied Rad's motion insofar as it sought leave to renew its opposition to Arnell's motion to dismiss, and granted Rad's motion insofar as it sought leave to amend its complaint. In denying leave to renew, this court noted that Justice Demarest had dismissed Rad's first, third, fourth, and fifth causes of action as time-barred and, thus, the newly discovered evidence of the August 2013 settlement would not have changed Justice Demarest's prior determination dismissing those claims. In granting Rad leave to amend its complaint, this court noted that Justice Demarest had determined that Rad (as alleged in its second cause of action) had a valid claim against Arnell in connection with Arnell's obligation to prosecute Rad's claim against the City, and that, in settling with the City, retaining the funds of the settlement, and releasing Rad's claim with prejudice, Arnell may have committed **[*6]** a separate breach of its obligation to Rad. This court, therefore, found that allowing Rad the opportunity to amend its complaint in order to reflect claims based on the August 2013 settlement would not be prejudicial to Arnell.

Rad's amended complaint, dated August 19, 2016, essentially asserts the same five causes of action, which were asserted in its original complaint. However, it adds the facts concerning Arnell's secret settlement with the City; the discontinuance with prejudice of Rad's pass-through claim by Arnell's discontinuance of its own claim, which encompassed Rad's pass-through claim; and the receipt of millions of dollars by Arnell from the August 2013 settlement.

Rad's first cause of action asserts a claim for breach of the subcontract. Specifically, Rad alleges that during the performance of its work on the project, it performed certain change orders, contract alternate, and additional and/or extra work pursuant to the subcontract, and that the agreed upon price and fair and reasonable value for this work was $582,799.37. It asserts that the subcontract price was, therefore, adjusted to the sum of $5,682,799.37, and that only the sum of $5,607,834.34 was paid, leaving a balance of $74,964.93 due and owing to it from Arnell. It alleges that Arnell was obligated under the terms of the contract and the subcontract, including but not limited to the subcontract's implied duty of good faith and fair dealing, to pay Rad its subcontract balance totaling the sum of $74,964.93 when Arnell was paid its contract balance from the City in the August 2013 settlement, and Arnell refused to do so. It seeks recovery of the sum of $74,964.93, plus interest thereon.

Rad's second cause of action asserts a claim for breach of the liquidating agreement. Rad alleges that Arnell failed in its obligations to present Rad's claims in a good faith, diligent manner in that the six-month limitations period for filing actions was triggered by the substantial completion of the project on December 7, 2007, and Arnell was notified of such substantial completion by the City on December 27, 2007, but Arnell did not file the New York County action for Rad's benefit until December 2010, at least two and a halfyears late and three years after Rad had submitted its pass-through claim to Arnell for presentation to the City. It further alleges that Arnell, in breach of the duty of good faith and fair dealing, failed to make a bona fide good faith effort to recover from the City a sufficient amount to compensate Rad for its damages and to negotiate a settlement of Rad's claims with the City. It asserts that, instead, Arnell negotiated and entered into a self-serving settlement with the City to the detriment of Rad, and without Rad's knowledge or consent, whereby Arnell discontinued, with prejudice,

the prosecution of Rad's claims in consideration of a settlement payment to Arnell from the City of more than $1.8 million plus the release of certain securities. Rad seeks, in this cause of action, recovery of an amount to be determined at trial, but not less than the sum of $2,099,192, **[*7]** together with interest.

Rad's third cause of action for breach of fiduciary duty alleges that Arnell breached its fiduciary obligation to it by failing to timely, effectively, or in good faith present its claims to the City and prosecute them. This cause of action seeks recovery of an amount to be determined at trial, but not less than the sum of $2,099,192, and that Arnell be required to indemnify Rad for any shortfall in any recovery on Rad's claims as a result of Arnell's improper conduct.

Rad's fourth cause of action for breach of the subcontract alleges that to the extent that Arnell caused or was responsible for delays and impediments to its work or its damages and additional costs, Arnell is directly responsible to it. It further alleges that the failure to resolve or to properly seek or obtain recompense for the period in which the City prevented the work from proceeding constituted an abandonment of the project by Arnell that caused it substantial damages. It asserts that Arnell was obligated under the terms of the contract and the subcontract, including but not limited to the subcontract's implied duty of good faith and fair dealing, to pay it some or all of its delay damages when Arnell was paid its contract balance and/or delay damages by the City in the August 2013 settlement. It seeks a sum to be determined at trial, but not less than $2,099,192, plus interest thereon.

Rad's fifth cause of action for unjust enrichment alleges that Arnell was unjustly enriched when it received a payment from the City of $1,838,495.69, together with the release by the City of securities in the amount of $1.8 million being held by the City in lieu of retainage. This amount consisted of Arnell's contract balance, which encompassed the release of retainage that included, upon information and belief, the retainage applicable to the work performed by Rad and the corresponding amount due to Rad from Rad's subcontract balance of $74,964.93, and/or included partial compensation for Arnell's delay claim, including Rad's delay claim in the amount of $2,099,192. It asserts that permitting Arnell to retain the benefit that it has received as a result of Rad's work, without a corresponding payment to Rad, would be unjust.

On June 23, 2018, Arnell filed its instant motion for summary judgment. On November 4, 2018, Rad filed its instant cross motion for summary judgment.

Discussion

Initially, Arnell argues that Rad's cross motion must be denied based on procedural grounds. Specifically, Arnell contends that Rad's failure to annex the pleadings to its summary judgment cross motion papers is a fatal defect which requires denial of such cross motion. This contention is without merit. CPLR 3212 (b) requires, among other things, that a moving party support its motion for summary judgment by attaching a copy of the pleadings. "However, CPLR 2001 permits a court, at any stage of an action, to disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced" (*Sensible Choice Contr., LLC v Rodgers*, 164 AD3d 705 , 706-707 , 83 N.Y.S.3d 298 [2d Dept 2018]; *see also Wade v Knight Transp., Inc.* ***[*8]*** , 151 AD3d 1107 , 1109 , 58 N.Y.S.3d 458 [2d Dept 2017]). Here, the pleadings were electronically filed and available to this court and the parties. In addition, the pleadings were submitted by Arnell in support of its own motion for summary judgment and in opposition to Rad's cross motion. Arnell does not assert that it was prejudiced by Rad's omission. Under these circumstances, the court may properly disregard Rad's omission (*see Sensible Choice Contr., LLC*, 164 AD3d at 707 ; *Studio A Showroom, LLC v Yoon*, 99 A.D.3d 632 , 632 , 952 N.Y.S.2d 879 [1st Dept 2012]; *Welch v Hauck*, 18 AD3d 1096 , 1098 , 795 N.Y.S.2d 789 [3d Dept 2005], *lv denied* 5 N.Y.3d 708 , 836 N.E.2d 1152 , 803 N.Y.S.2d 29 [2005]).

Arnell further argues that Rad's failure to submit a Counter-Statement of Material Facts is fatal to its cross motion. Arnell asserts that this failure is in contravention of Rule 15 of the Kings County Commercial Division Rules, which requires that "[a]ll summary judgment motions shall be accompanied by a Statement of Material Facts as set forth in Uniform Rules, § 202.70 (g) , Rule 19-a." Arnell's argument is rejected. Rad, in reply, has submitted a combined response to Arnell's Rule 19-a Statement of Material Facts and a Rule 19-a Counter-Statement of Material Facts. Rad's initial "failure to comply with the requirements of Rule 15

was 'a mere non-prejudicial irregularity that may be ignored'" (*Beys Specialty, Inc. v Euro Constr, Servs., Inc.*, 39 Misc 3d 1205 [A], 971 N.Y.S.2d 69 , 2013 NY Slip Op 50497[U] , *7 [Sup Ct, Kings County 2013], affd 125 AD3d 911 , 5 N.Y.S.3d 153 [2d Dept 2015], quoting *Hiller v Bud*, 33 Misc 3d 1213[A] , 939 N.Y.S.2d 740 , 2011 NY Slip Op 51914[U] , *7 [Sup Ct, Kings County 2011]; *see also* CPLR 2001). Thus, the court shall address Rad's cross motion, along with Arnell's motion, on the merits.

Arnell, in support of its motion, for summary judgment, contends that Rad's first cause of action is time-barred. As noted above, Rad's first cause of action for breach of the subcontract is the same claim that was asserted by Rad in its original complaint, which was dismissed as time-barred. Rad attempts to recast this claim as viable based on Arnell's August 2013 settlement of the New York County action, However, the August 2013 settlement does not change the date upon which Rad's breach of contract claim based on the subcontract accrued. The August 2013 settlement pertained to Arnell's claims against the City and the DOS, which incorporated Rad's pass-through claims, pursuant to the liquidating agreement, which was independent of the subcontract.

Rad further argues that its first cause of action is not time-barred because it is a claim for monies had and received, and that this claim accrued when Arnell entered into the August 2013 settlement and received monies. This argument must be rejected. A claim for monies had and received is an equitable claim similar in theory to unjust enrichment, which sounds in quasi-contract (*see Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128 , 138 , 576 N.E.2d 716 , 572 N.Y.S.2d 885 [1991]). Here, Rad's claim for its unpaid balance on the subcontract is governed by the subcontract, and, as previously noted, the statute of limitations has expired for this claim. The August 2013 settlement did not revive this claim for breach of the subcontract or start the statute of limitations to run anew. Therefore, summary judgment dismissing Rad's first cause **[*9]** of action as time-barred must be granted (*see* CPLR 3212 [b] ; CPLR 213 [2]).

Rad's third cause of action for breach of fiduciary duty is identical to the one asserted in its original complaint. As such, it is time-barred. While Rad claims that Arnell's breach of fiduciary duty claim pertains to the August 2013 settlement, this claim, as alleged, asserts that Arnell failed to timely present its claims to the City and prosecute and negotiate them with the City, and does not make any allegations with respect to the August 2013 settlement. Rad also argues, in its papers, that Arnell breached its fiduciary duty to it by keeping the August 2013 settlement a secret from it, while releasing its pass-through claims. However, Arnell's claims, which encompassed Rad's claims, had already been dismissed as time-barred by Justice Bransten, in the New York County action, at the time of the August 2013 settlement, and, therefore, Rad was not put in any worse position by the August 2013 settlement. Thus, summary judgment dismissing Rad's third cause of action must be granted (*see* CPLR 3212 [b]).

Rad's fourth cause of action for breach of the subcontract is the same claim as previously asserted in its original complaint in this action and dismissed by Justice Demarest in the June 5, 2015 decision and order as time-barred. The August 2013 settlement did not, in any way, change the accrual date for this claim. It, therefore, must be dismissed (*see* CPLR 3212 [b] ; 213 [2]).

Rad's fifth cause of action for unjust enrichment is the same claim as previously asserted in its original complaint and dismissed by Justice Demarest in the June 5, 2015 decision and order. Therefore, it also must be dismissed since the liquidating agreement is a valid and enforceable written contractual agreement, which governs Rad's claims (*see* CPLR 3212 [b] ; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 , 389 , 516 N.E.2d 190 , 521 N.Y.S.2d 653 [1987]; *Grace Indus., Inc. v New York City Dept. of Transp.*, 22 AD3d 262 , 263 , 802 N.Y.S.2d 409 [1st Dept 2005], *lv denied* 6 N.Y.3d 703 , 844 N.E.2d 791 , 811 N.Y.S.2d 336 [2006]; *Aviv Constr. v Antiquarium, Ltd.*, 259 AD2d 445 , 446 , 687 N.Y.S.2d 344 [1st Dept 1999]).

With respect to Rad's second cause of action, Arnell contends that summary judgment dismissing it must be granted on the basis that any delay claim is barred by a no-damages-for-delay clause contained in article 13.10 of the contract between Arnell and the City and the DOS, which is binding on Rad pursuant to paragraph 1 of the subcontract. Arnell further contends that the August 9, 2002 letter was not a liquidating agreement,

and that no duty of good faith and fair dealing was breached because it had no responsibility for the delays on the project.

These contentions are devoid of merit. As previously ruled by Justice Demarest, in the June 5, 2015 decision and order, it is irrelevant whether Rad's claim was for extra work or for delay since the liquidating agreement provides an independent basis from the subcontract for Rad's second cause of action. "[T]here need not be 'actual contractual liability' between the contractor and subcontractor in the subcontract as a prerequisite to the enforceability of a liquidating agreement" (*RAD & D'Aprile Inc.*, 49 Misc 3d at 200 ; *see also North Moore St. Devs., LLC v Meltzer/Mandl Architects, P.C.*, 23 AD3d 27 , 34-35 , 799 N.Y.S.2d 485 [1st Dept 2005]). "[T]he general **[*10]** contractor, in entering into a liquidating agreement, must assume such liability in order to pursue a claim against the owner on behalf of the subcontractor" (*RAD & D'Aprile Inc.*, 49 Misc 3d at 200 ; *see also North Moore St. Devs., LLC*, 23 .AD3d at 31).

Here, no independent liability of Arnell under the subcontract was required (*see A. Servidone, Inc./B. Anthony Constr. Corp., J. V. v State of New York*, 168 AD3d 648 , 650 , 92 N.Y.S.3d 75 [2d Dept 2019]; *North Moore St. Devs., LLC*, 23 AD3d at 34-35 ; *Bovis Lend Lease LMB v GCT Venture*, 285 AD2d 68 , 70 , 728 N.Y.S.2d 25 [1st Dept 2001]). In entering into the liquidating agreement, Arnell assumed liability for Rad's damages occasioned by the City's delays to the extent of $100,000 plus any recovery it obtained above that amount. As set forth above, the liquidating agreement expressly provided that Rad's additional costs, "due to delays," would be incorporated into Arnell's claims against the City at the completion of the contract, and that any money received in the settlement of the claim for Rad over the sum of $100,000, which Arnell agreed to pay to Rad as an increase to Rad's subcontract "due to delays," would be forwarded to Rad. Thus, regardless of the incorporation in the subcontract of the general contract terms, which included a no-damages-for-delay clause, the liquidating agreement superseded and modified these terms by providing, independently of the subcontract, that Rad's delay damages would be paid to Rad in this manner. Since the liquidating agreement superseded the subcontract, Rad's sole remedy is under the liquidating agreement (*see Shomar Constr. Servs. v Lawman Constr. Co.*, 262 AD2d 956 , 956 , 693 N.Y.S.2d 784 [4th Dept 1999]).

While Arnell now argues that there was no liquidating agreement, the Appellate Division, Second Department, in this case, held that the requirements for an enforceable liquidating agreement are as follows:

> "'(1) the imposition of liability upon the general contractor for the subcontractor's increased costs, thereby providing the general contractor with a basis for legal action against the owner; (2) a liquidation of liability in the amount of the general contractor's recovery against the owner; and, (3) a provision that provides for the 'pass-through' of that recovery to the subcontractor' (*Rad & D'Aprile, Inc.*, 159 AD3d at 972-973 , quoting *Bovis Lend Lease LMB*, 285 AD2d at 70 ; *see also Barry, Bette & Led Duke v State of New York*, 240 AD2d 54 , 56 , 669 N.Y.S.2d 741 [3d Dept 1998], *lv denied* 92 N.Y.2d 804 , 700 N.E.2d 318 , 677 N.Y.S.2d 779 [1998]).

Here, the August 9, 2002 letter meets these requirements.

Indeed, this same argument that the August 9, 2002 letter was not a liquidating agreement was previously made by Arnell before Justice Demarest, and expressly rejected by Justice Demarest, as well as by the Appellate Division, Second Department, which affirmed Justice Demarest's June 5, 2015 decision and order. Indeed, Justice Demarest ruled that there was an express contractual undertaking by Arnell to be responsible for the delays caused by the City, and that the August 9, 2002 letter was "a classic liquidating agreement enforceable at law" (*RAD & D'Aprile Inc.*, 49 Misc 3d at 201). This ruling constitutes the law of the case.

Under the doctrine of law of the case, a party is precluded "from relitigating an issue that has already been decided" (*Chanice v Federal Express* ***[*11]*** *Corp.*, 118 AD3d 634 , 635 , 989 N.Y.S.2d 468 [1st Dept 2014]). Arnell argues that the law of the case doctrine is inapplicable because this ruling by Justice Demarest was made in the context of a motion to dismiss, as

opposed to a motion for summary judgment. This argument is devoid of merit since the issue of whether the August 9, 2002 letter was a liquidating agreement was directly addressed and decided in Justice Demarest's June 5, 2015 decision and order.

Arnell, for the first time, now contends that there was no subcontract in existence between it and Rad at the time of the August 9, 2002 letter and that they did not enter into a subcontract until September 2003, over a year later. It argues that, as such, the August 9, 2002 letter could not have been a valid liquidating agreement because there was no subcontract between them at that time, and that it was nothing more than an accommodation to Rad so that Rad would not walk away from the project.

In support of its argument regarding the date of execution of the subcontract, Arnell attaches a fax dated September 29, 2003, which states that as "per our telephone conversation, attached is one copy of Rad's ... executed contract," and "for your use and records, an executed copy will also be sent to you by mail." However, this only shows that there was a request for a copy of the subcontract on September 29, 2003, not that the subcontract was executed on that date. The face of the subcontract states that it was entered into on August 22, 2001. There is no indication on the subcontract itself of any different date of execution.

Arnell also has submitted the affidavit of its president, Mr. Zarember, who asserts that Rad and Arnell did not enter into the subcontract until September 29, 2003. Mr. Zarember claims that as he prepared for his deposition, he first realized this. Arnell relies upon a July 25, 2003 letter from Mr. Feldman, on behalf of Rad, to Mr. Aronowitz of Arnell, asserting that the labor compensation was unacceptable and disputing the existence of an agreement as to price. Arnell asserts that this July 25, 2003 letter supports its position that there was no subcontract at the time of the August 9, 2002 letter, but only a proposed subcontract. However, on May 1S, 2017, when Mr. Zarember's deposition was held, he was shown this July 25, 2003 letter, and he testified that this letter showed that Rad was looking for an increase in the subcontract amount, not that the subcontract had not yet been executed. Throughout this litigation, Arnell signed numerous documents stating, under oath, that the subcontract was entered into on August 22, 2001. Indeed, Arnell, in its brief before the Appellate Division, Second Department, appealing Justice Demarest's June 5, 2015 decision and order, stated that it entered into the subcontract with Rad on August 22, 2001.

"'Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding" (*Matter of Hartsdale Fire Dist. v Eastland Constr., Inc.*, 65 AD3d 1345 , 1346 , **[*12]** 886 N.Y.S.2d 454 [2d Dept 2009], *lv denied* 14 N.Y.3d 701 , 925 N.E.2d 101 , 898 N.Y.S.2d 96 [2010], quoting *Maas v Cornell Univ.*, 253 AD2d 1 , 5 , 683 N.Y.S.2d 634 [3d Dept 1999], *affd* 94 NY2d 87 , 721 N.E.2d 966 , 699 N.Y.S.2d 716 [1999]; *see also Tobias v Liberty Mut. Fire Ins. Co.*, 78 AD3d 928 , 929 , 910 N.Y.S.2d 663 [2d Dept 2010]). Thus, based upon Arnell's prior representation of the date of the subcontract, it is precluded, pursuant to the doctrine of judicial estoppel, from changing its position to now assert that the subcontract was entered into on a date different than that previously alleged by it.

There is no genuine issue raised regarding the fact that the liquidating agreement was separately negotiated after Rad's claim for additional payments arose. Moreover, Arnell does not dispute that it paid Rad $100,000 and undertook the obligation to pursue Rad's claims, as part of its own claims against the City. The implied contractual covenant of good faith and fair dealing applies to a liquidating agreement. The Appellate Division, Second Department, in affirming Justice Demarest's decision and order, expressly held that "[l]ike every contract, the contractual covenant of good faith and fair dealing is implied in a liquidating agreement" (*Rad & D'Aprile, Inc.*, 159 AD3d at 973 ; *see also Martin Mech. Corp. v Mars Assoc.*, 158 AD2d 280 , 281 , 550 N.Y.S.2d 681 [1st Dept 1990]). It specifically noted that "[t]he covenant of good faith and fair dealing in this context requires the general contractor to 'take all reasonable steps so that the [subcontractor's] right to an eventual recovery, if any, from the [owner] will be protected'" (*Rad & D'Aprile, Inc.*, 159 AD3d at 973 , quoting *Martin Mech. Corp.*, 158 AD2d at 281 ; *see also T.G.I. East Coast Constr. Corp. v Fireman's Fund Ins. Co.*, 534 F. Supp. 780 , 782 [SD NY 1982]). A general contractor has "a duty to make a good faith effort to present [the subcontractor's] claim to the [owner] in a fair and

serious manner" (*T G. I. E. Coast Constr. Corp.*, 534 F Supp at 782). A breach of this covenant of good faith and fair dealing by failing to timely present a subcontractor's claims to the owner, pursuant to the liquidating agreement, will result in a general contractor's liability for the subcontractor's full damages (*see Shomar Constr. Servs.*, 262 AD2d at 956).

Here, Arnell failed to take reasonable steps so that Rad's right to an eventual recovery from the City was protected. Egregiously, Arnell did not even inform Rad or Justice Demarest of the August 2013 settlement, thus supporting Rad's claim that Arnell acted in bad faith. Arnell has not made any showing whatsoever that it protected Rad's claims or acted in good faith. There is no dispute that Arnell failed to prosecute Rad's claim in a timely manner and that Rad's claim, which had been included as part of Arnell's claim, was dismissed because Arnell waited too long to prosecute Rad's claim. There is also evidence that Arnell was informed by the City that Arnell needed to submit close-out documents, including claims, but that Arnell failed to perform the liquidating agreement. Arnell, in support of its motion and in opposition to Rad's cross motion, merely reiterates its prior arguments that no valid liquidating agreement existed, despite the fact that Justice Demarest and the Appellate Division have already ruled to the contrary.

When Arnell settled with the City in the August 2013 settlement, one **[*13]** of the claims released by Arnell in exchange for the cash and securities was Rad's claim for damages, which Arnell had failed to timely interpose. Arnell contends that its August 2013 settlement with the City did not encompass any compensation for delay-related claims on the project. Arnell claims that it lost out on its own delay-related claims against the City, which totaled over $10 million. Arnell argues that the monies received by it in the August 2013 settlement with the City included nothing more than payment for the outstanding contract balance and approved change orders in exchange for it agreeing to not continue to pursue its delay claim, which had been adjudged as untimely by Justice Branstein. In support of this argument, Arnell points to an email from Assistant New York City Corporation Counsel Susan Smollens, dated January 10, 2011, which stated that "[t]he Comptroller may be willing to consider settling the contract balance portion of the claim, but only in exchange for Arnell's release of its other claims against the City in connection with the Brooklyn 1 and 4 project." Arnell also points to a May 31, 2013 email, which indicates that the City was willing to pay Arnell its contract balance and approved change orders in the settlement of its claim. The settlement sum received by Arnell from the City was unallocated, and there is no showing that the August 2013 settlement allocated any funds to Rad's claim.

Since Arnell claims that no part of the settlement constituted payments for Rad's claim, Arnell has not shown that it ever took proper steps to protect Rad's claim. Arnell's failure to act in a timely manner is the reason why it lost part of its own claim and Rad's claim.

Summary judgment in favor of Rad and against Arnell must be granted on Rad's claim, as encompassed in its second cause of action, that Arnell breached the liquidating agreement by not prosecuting Rad's claim in a timely manner (*see Shomar Constr. Servs.*, 262 AD2d at 956 ; *Nolfi Masonry Corp. v Lasker-Goldman Corp.*, 160 AD2d 186 , 187 , 553 N.Y.S.2d 156 [1st Dept 1990]). Arnett has failed to raise any genuine question of fact as to whether it diligently performed its obligation to Rad in presenting its claims to the City.

Inasmuch as Arnell denies that any portion of the settlement funds were allocated to Rad's claim, the amount owed to Rad cannot be limited to the amount of any money received by Arnell from the City in the settlement of Rad's claim pursuant to the terms of the liquidating agreement. Arnell does not dispute that it would have realized a substantially higher settlement amount or judgment in the New York County action if Rad's claim were not time-barred, Since Arnell breached the liquidating agreement by not presenting Rad's claims in a timely manner, Rad is entitled to damages based upon Arnell's breach of the liquidating agreement, as opposed to a recovery of a portion of the settlement funds. Since the amount of damages is disputed and, cannot be ascertained on this motion and cross motion, an inquest on the issue of damages must be held.

Conclusion

Accordingly, Arnell's motion is granted **[*14]** insofar as it seeks summary judgment dismissing Rad's first, third, fourth, and fifth causes of action, and is denied insofar as it seeks summary judgment dismissing

Rad's second cause of action. Rad's cross motion, insofar as its seeks partial summary judgment in its favor, is granted with respect to its second cause of action, and is denied with respect to its first, third, fourth, and fifth causes of action. An assessment of damages shall be scheduled and held at a future date.

This constitutes the decision, order, and judgment of the court.

ENTER,

/s/ Sylvia G. Ash

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fn 1

The term "Commissioner" is defined in section 2.1.6 of the contract between the DOS and Arnell as "the head of the Agency that had entered into this Contract or his/her duly authorized representative."

fn 2

Since Justice Demarest had retired, this court decided that motion.